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Federal Communications Commission
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Re: CC Docket No. 96-45 FEDERAL-STATE JOINT BOARD ON UNIVERSAL SERVICE

Dear Mr. Caton:

Enclosed is an Original and twelve copies of the Maine Public Utilities Commission and Vermont Public Service Board ex parte presentation made by various staff members of the Commission on April 7, 1997, in the above docket. Please date stamp one copy and return in the enclosed self-addressed stamped envelope.

Sincerely,

Joel Shifman

cc: International Transcription Service
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EX PARTE PRESENTATION OF

MAINE PUBLIC UTILITIES COMMISSION
AND
VERMONT PUBLIC SERVICE BOARD

SUPPORTING USE OF
COMBINED INTERSTATE AND INTRASTATE REVENUES
OF INTERSTATE CARRIERS IN
FEDERAL UNIVERSAL SERVICE PROGRAMS

April 7, 1997

Joel Shifman, Esq., Maine PUC
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The Commission is debating how it will fund programs needed to carry out its universal service obligation under section 254 of the Act. The Joint Board has recommended that the Commission require interstate carriers to contribute based upon their gross revenues, net of payments to other carriers. The Commission is considering whether to impose charges upon the intrastate and interstate revenues ("combined revenues") of carriers that provide interstate services. In this *ex parte* filing, the Maine Public Utilities Commission and the Vermont Public Service Board present the legal and policy arguments supporting the use of combined revenues.

I. A UNIVERSAL SERVICE MECHANISM BASED SOLELY UPON INTERSTATE REVENUES MAY NOT MEET THE REQUIREMENTS OF THE ACT.

A. Universal service programs funded by combined revenues are more likely to be sufficient to meet the Act's objective of reasonably comparable rates.

The Act requires that the Commission adopt universal service mechanisms sufficient to the purpose of ensuring that all consumers, including . . . those in rural, insular, and high cost areas, have access to telecommunications and information services . . . at rates that are reasonably comparable to rates charged for similar services in urban areas. 47 U.S.C. § 254(b)(5)(emphasis added). In addition, the Act requires that the mechanism selected to support universal service be"specific, predictable and sufficient." 47 U.S.C. §§ 254(b)(5), (d)(emphasis added).

The Commission is considering adopting a "proxy model" for costs. Although a final proxy model has not yet been selected, analyses of current versions of these models show the problem clearly. If the Commission were to impose a charge solely upon interstate revenues, the rate of the surcharge might need to be unacceptably high.[1]

The Commission might therefore seek ways to curtail the size of the federal fund. Numerous mechanisms exist for curtailment, including raising the "revenue benchmark," paying only a portion of the need, or imputing a state program. While some of these mechanisms might be less onerous than others, any curtailment mechanism faces the risk that the overall system does not meet the "sufficiency" and "reasonably comparable rates" requirements of the Act.

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[1] For example, in analyses conducted in December, 1996 by the NARUC Staff Subcommittee on Communications, it appeared that a surcharge of as much as 21 percent might be needed to finance the "BCM2" model at a revenue benchmark of $20.

Curtailment of benefits would directly violate the terms of the Act. Once the Commission has identified cost differences between urban and rural areas, the Commission must then raise the funds to make rates reasonably comparable. Standing alone, the federal program must be sufficient to obtain reasonably comparable rates. The Act does not authorize the Commission to rely upon state programs in order to meet this requirement. In short, Congress intended there to be national averaging of local exchange rates, through an explicit universal service mechanism operated by the Commission.

B. **Even if it is permissible to rely upon state universal service programs as an element in a total universal service system, some states will still not achieve reasonably comparable rates.**

Even if one were to mistakenly accept the view that, as a matter of law, the Commission can rely upon state programs in order to meet the universal service goals of the Act, any federal benefit curtailment could still block achievement of the goals of the Act. The result will depend upon the details of how the Commission curtails benefits to high cost areas.

Consider, for example, what would happen if the Commission were to decide that the federal program should pay only 25 percent of the recognized cost of making rates comparable. This would leave 75 percent of the fiscal load to the states. However, states differ considerably in the size of their needs in relation to their own revenue streams. Some states would need to impose a large surcharge upon their own intrastate revenues.

However, state surcharges can be self defeating. If a state needed to raise a large amount of money to support high cost areas, it would most naturally apply a charge on both local exchange and intrastate interexchange services. This would produce some net contribution to local from toll. However, the principal phenomenon could be a transfer from local ratepayers in one area to local ratepayers in another part of the same state. All local ratepayers might wind up with the same rates, but those rates might still be higher than those in urban areas of other states.

This result could violate the Act. In enacting section 254, Congress did not intend that rates merely be reasonably comparable within each state. Rather, the Act requires that rates in rural and high cost areas *in the United States* be reasonably comparable to rates in urban areas elsewhere *in the United States*. This cannot be accomplished by state programs that merely redistribute revenues within state boundaries.

In summary, if the Commission curtails distribution benefits to high cost areas, it will be unlikely to meet the statutory requirement of reasonably comparable rates.

II. The Communications Act Permits the Commission to Support Universal Service Mechanisms with Charges on the Combined Revenue of Interstate Carriers

A. The Telecommunications Act of 1996 does not prohibit the Commission from requiring contributions from interstate carriers based upon their combined revenues.

The Telecommunications Act of 1996 ("The Act") requires that funding for the federal universal service program be derived from "every telecommunications carrier that provides interstate service." 47 U.S.C. § 254(d) (emphasis added). This language is significant both for what it says and for what it does not say.

The effect of this language is to prohibit the Commission from requiring universal service contributions from carriers who engage only in *intrastate* services.[2] Conversely, however, the Commission must require contributions from all *interstate* carriers. This must include interexchange carriers, since they directly provide interstate services. Contributors must also include local exchange companies, since they originate and terminate interstate traffic and are compensated for that service.

However, whereas the Act is specific about which carriers must contribute, it speaks in only the most general terms about how contributions are to be calculated. For example, contributions must be "equitable and nondiscriminatory." 47 U.S.C. § 254(d). In addition, the mechanisms for universal service must be "specific, predictable and sufficient," 47 U.S.C. §§ 254(b)(5), (d).[3] The Joint Board has recommended an additional standard, that the high cost mechanism be "competitively neutral." Joint Board Recommendations, ¶ 23. Aside from these general principles, the Act does not mandate the basis upon which interstate carriers must contribute to universal service.[4]

In summary, there is no explicit provision in the Act defining the basis for carrier contributions. The plain language of the Act should be applied: the statute identifies *who* must contribute to

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[2] Such providers might, for example, resell intrastate toll services.

[3] This standard clearly applies to distribution policies, but may also apply to revenue policies.

[4] The Joint Board also recommended that contributions from interstate carriers be made on the basis of the gross revenues of carriers, net of payments to other carriers. Joint Board Recommendations, ¶ 807. This recommendation is entirely consistent the broad principles established by the Act.

universal service, not *how much* that contribution must be or *from which portions* of a carrier's business it should be derived.

B. The statutory criteria relating to universal service will be better served by imposing a charge on combined revenues.

Use of combined revenues would better meet the statutory standards set out in the Act and would be desirable for other policy reasons as well.

1. Use of combined revenues is "equitable and nondiscriminatory."

47 U.S.C. § 254(d) requires that any charge on combined revenues must be "equitable and nondiscriminatory." The combined revenues option meets this test.

a. The combined revenues option will present fewer opportunities to evade the surcharge and, for that reason, is the more sustainable option.

If the Commission were to impose a high surcharge rate on interstate services, but no surcharge on intrastate services, carriers would have a strong incentive to classify services as intrastate. For example, many carriers currently offer services in both the interstate and intrastate jurisdictions.[5] Nothing prohibits these carriers from engaging in creative rate designs to evade the Commission's universal service surcharge.

As an extreme example, a carrier could offer free or low priced interstate services as an adjunct to the purchase of intrastate services. By shifting revenue to the intrastate jurisdiction, the carrier has successfully reduced its own liability, and thus gained a competitive advantage. This same behavior, however would produce several undesirable results:

- inaccurate reporting of interstate traffic volumes and revenues;
- unpredictability for federal universal service revenues; and
- erosion of revenue as carriers learn techniques to minimize their federal universal service contributions.

The problem may be particularly acute as to carriers who are not required to file tariffs and are not subject to rate regulation for their interstate services. While traditional local exchange companies

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[5] This phenomenon may accelerate as regional Bell companies enter interstate markets under section 271 of the Act.

have employees who are trained in separations, not all resellers will have fully trained employees. Even under the best of circumstances, it may be difficult for such carriers to perform separations competently and to calculate payments accurately.[6]

Universal service cannot be adequately served by a system in which carriers can evade a substantial portion of their obligations through creative rate design. The combined revenues option reduces the opportunity for such evasion.

b. **The combined revenues option will reduce incentives to bypass the public switched telephone network.**

A significant surcharge on telecommunications services would create an economic incentive to bypass the public switched telephone network ("PSTN"). For example, advanced services tend to take digital form, and they can easily be transmitted on parallel networks. If parallel networks can avoid the universal service surcharge, they will gain digital traffic over time. In the extreme, the PSTN could be relegated to serving mainly low bandwidth applications.

The incentive for bypass will be minimized, however, by a low surcharge rate. It has been estimated that interstate revenues are approximately 40 percent of total revenues.[7] Therefore, at a given federal fund size, a surcharge rate on combined revenues would need to be only 40 percent of the rate that would be necessary if the system were limited to interstate revenues. The combined revenues option, therefore, will substantially reduce the incentive for bypass.

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[6] This could prove a more serious problem than the Commission has encountered in the reporting of "PIU." As with PIU, there would be a the problem of inaccurate reporting. Here, however, there is a compounding difficulty in that it will be difficult to define the service rendered to the customer.

[7] Net combined carrier revenues have been estimated at approximately $167 to $168 billion, while net interstate carrier revenues have been estimated at approximately $65 to 69 billion. Eisner, J., Distribution of Intrastate and Interstate Telephone Revenue by States, (unpublished paper) FCC Industries Analysis Division, January, 1997; Staff Subcommittee on Communications of the National Association of Regulatory Utility Commissioners, The Revenue Base for Federal Universal Service Support, A Report to State Public Utility Commissions, December, 1996.

c. **The combined revenues option will be easier for carriers to administer.**

Even for incumbent local exchange carriers, separations has become increasingly complex. For new entrants whose earnings are not regulated, however, the problem is more serious. These carriers have little reason to differentiate interstate from intrastate services, and may not even file tariffs. Such carriers may not know whether a particular service is in the interstate jurisdiction.

The combined revenues option would simplify the payment process for many carriers. If the states and the Commission were to adopt identical definitions of the services that are subject to universal service charges, carriers could use a single accounting system to determine their contributions for universal service. Each service would either be subject to two charges (one federal and one state) or to no charge. Moreover, in calculating the amount due, the carrier would not be required to determine whether the service is intrastate or interstate.

2. **Use of combined revenues is "specific, predictable and sufficient."**

The Act requires that the mechanism selected to support universal service be "specific, predictable and sufficient." 47 U.S.C. §§ 254(b)(5), (d).

The combined revenues option would be no more and no less "specific" than the interstate revenues option. In both cases the mechanism for collecting and distributing the funds is clear and specific.

Combined revenues will be more "predictable" than revenues based upon only interstate services. As discussed above, carriers may engage in avoidance activities, and it will be difficult for the Commission to predict the revenues needed to support universal service.

In addition, the Commission and the states are engaged in a continuing dialogue over the proper jurisdictional assignment of new services. This dialogue could become more difficult if the Commission's universal service system contains incentives for the Commission to classify more services in the interstate jurisdiction.

Most important, as discussed above, the combined revenues option is more likely to produce "sufficient" support. Net combined carrier revenues are more than double the amount of interstate revenues. If there is a practical upper limit on the surcharge rate that can be imposed to support universal service, a system funded by the larger revenue base is more likely to meet the needs of its distribution system.

3. **Use of combined revenues is "competitively neutral."**

Support for universal service based upon combined revenues would be "competitively neutral," as required by the Joint Board's Recommendations. So long as wholesale transactions are excluded from the charge (either by deducting payments to other carriers or by charging only retail revenues) the system will not discriminate in favor of vertically integrated carriers.

C. **Use of combined revenues of interstate carriers does not violate jurisdictional separations, nor does it invade the rate jurisdictions reserved to the states.**

1. **The jurisdictional separation of rates between federal and state jurisdictions does not prohibit a surcharge on combined revenues.**

The jurisdictional separation statute within the Communications Act of 1934 gives the states sole jurisdiction over the

> charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier." 47 U.S.C. § 152(b).

Section 152(b) protects the right of the states to *set rates* for intrastate services. However, the combined revenues option does not violate section 152(b) because, although it would have an effect on intrastate rates, it does not amount to setting rates.

It cannot be maintained that any federal action that has an effect upon intrastate rates is a violation of section 152(b). The difficulties inherent in such a position become immediately apparent in the area of taxation.[8] The federal government today imposes a direct tax upon intrastate telecommunications services.[9] In addition, federal taxes impose costs upon carriers that affect

[8] The analogy is imperfect because universal service charges are not taxes. However, they would be imposed pursuant to an explicit grant of authority from Congress. In that sense, taxes can illustrate the possible scope of each state's authority under section 152(b).

[9] The federal government imposes an excise tax of three percent upon intrastate telecommunications services, including local exchange and toll services. 26 U.S.C. § 4251. This excise tax and the Communications Act of 1934 have coexisted since 1954, when the excise tax was established. Aug. 16, 1954, c. 736, 68A Stat. 503.

intrastate rates.[10] No state would seriously argue that such taxes violate section 152(b). For the same reason, a universal service surcharge on the combined revenues of interstate carriers, imposed under explicit authority from Congress, would not violate section 152(b).

2. Since the purpose of the universal service program is to provide for comparable and affordable intrastate rates, Congress may have expected the Commission to finance this program with charges on combined revenues.

The principal purpose of federal support for high cost areas is to affect rates in the intrastate jurisdiction: to ensure that such rates are reasonably comparable between rural and urban areas.[11] Short of preemption, it is hard to imagine a federal regulatory program having a purpose more intimately connected with intrastate rates.

This intrastate purpose justifies requiring contributions from both interstate and intrastate services. Congress could quite rationally have expected the Commission to finance this program from the combined revenues of interstate carriers, not merely those that happen to fall within the rate setting jurisdiction of the Commission.

D. The language in the Act regarding state universal service programs does not prevent the Commission from using combined revenues.

The Act requires that funding for the federal program be derived from "every telecommunications *carrier* that provides *interstate* service." 47 U.S.C. § 254(d) (emphasis added). The Act also directs that state universal service programs be supported by "every telecommunications *carrier* that provides *intrastate* service." 47 U.S.C. § 254(f) (emphasis added). Although there is an important difference in the language in the two subsections, that difference applies to the identity of

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[10] For example, the federal government imposes a corporate income tax upon earnings from the operations of communications companies. This tax adds to the costs of these companies in providing intrastate services. Indeed, the federal income tax is an explicit consideration in most state rate making proceedings, and state commissions routinely set rates so that regulated carriers can recover the just and reasonable costs, including federal taxes.

[11] 47 U.S.C. 254(b)(3).

the contributing carriers, not to the basis for their contributions. The plain meaning of each section states *who* must contribute to universal service, not *how much* that contribution must be or *from which portions* of a carrier's business it should be derived.

It is true that the set of "interstate" carriers and the set of "intrastate" carriers are nearly congruent. For example, many interexchange carriers provide both interstate and intrastate services, and thus could be required to contribute to both federal and state programs. Yet there are also important differences between these two sets. Not all carriers operate in all jurisdictions.

Congress may have had any number of legitimate legal or political purposes in mind in creating this scheme. One possible motive may have been to align universal service burdens with existing ratemaking jurisdictions, thereby recognizing the continuing role of state commissions over intrastate services. Each state controls the identity of the companies that may provide intrastate service in that state. For example states are now processing numerous applications for certificates of public convenience and necessity filed by long distance service resellers. In some cases these resellers already offer interstate services in the state. Such interstate services are under the jurisdiction of the Commission, even though provided in the state. Such carriers can be required today to contribute a portion of their revenues to the federal universal service program.

A state application, however, is intended to lead to the offering of *intrastate* services. Until that state application is granted, section 254(f) of the Act may prohibit a state from requiring that the carrier contribute to its own universal service program. Whether Congress simply chose to defer to state jurisdiction or thought it must do so,[12] the difference between subsections 254(d) and 254(f) of the Act can be easily explained.

If this theory of deference to the states is correct, Congress would next have considered whether to impose an analogous limitation on federal universal service programs. It would have been natural for Congress to decide that the Commission should obtain contributions only from carriers over whom it has rate jurisdiction. The limitation in section 254(d) is exactly analogous, therefore, to the

[12] In enacting section 254, Congress may also have wanted to be cautious because of prior court holdings relating to state taxing jurisdiction. The Supreme Court has held that, consistent with the Commerce Clause, a state can impose a sales tax on interstate telecommunications. This is true, however, only if the service subject to the tax has a significant connection to the state. *Goldberg v. Sweet*, 109 S.Ct. 582 (1989). By limiting contributors to state programs to those carriers providing intrastate services, the Act thus fits within the perimeter defined by such cases.

limitation in section 254(f). In both cases, universal service contributions can be required only of carriers already regulated by the relevant commission.

Congress could have had any number of legitimate legal or political purposes in mind when it created subsections 254(d) and 254(f). When a rational purpose can be found for clear statutory language with a plain meaning, there is no need to seek new and different readings that do not comport with the actual words.

III. UNIVERSAL SERVICE PROGRAMS FUNDED BY COMBINED REVENUES WILL BE FAIRER TO STATES THAT HAPPEN TO HAVE A HIGH PROPORTION OF INTERSTATE TRAFFIC.

Available estimates show that the states differ considerably in the percentage of their telecommunications revenue streams that fall in the interstate jurisdiction. Some states, like Michigan and California, appear to have only about 30 percent of their telecommunications revenues in the interstate jurisdiction. Several other states, like Delaware, Wyoming and Vermont, find that interstate revenues constitute more than 50 percent of their total. In Nevada, 61 percent of revenues are estimated to be interstate.[13]

This variation in interstate share may arise from a number of sources. One source almost certainly is the general tendency for residents of small states to make more calls across interstate boundaries. In some areas, citizens must make interstate calls to receive even basic services. Portions of Vermont, for example, are served by a large university medical center in Hanover, New Hampshire. Residents of Vermont near this hospital must make an interstate call for almost any kind of hospital-related medical service.

If the Commission relies solely upon interstate revenues, states with a high interstate share will be required to contribute disproportionately. This would be particularly unfair if the source of that high interstate share results from the need to make interstate calls to obtain basic services like medical care.

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[13] Eisner, J., Distribution of Intrastate and Interstate Telephone Revenue by States, (unpublished paper) FCC Industries Analysis Division, January, 1997.

The variance in interstate shares could also handicap some states in supporting their own programs. For example, if the Commission decides to rely only upon interstate revenues, states would be likely to define their own programs based upon a charge only on intrastate revenues. This would mean that Nevada's state program would be financed from a base of only 39 percent of Nevada's total communications revenue. By contrast, a program in Michigan could be based upon 69 percent of Michigan's telecommunications revenue. Such differences would disproportionately weaken the ability of some states to achieve their own universal service objectives.

This problem can be avoided altogether if the Commission relies upon combined revenues. States then would have little or no incentive to base their own program solely upon intrastate revenues. Rather, they would be likely to follow the federal lead and finance their own programs with charges on combined revenues.[14] The result would be the uniform utilization of the national telecommunications system to support the nation's universal service programs, and the uniform utilization of each state's telecommunications system to support its own universal service programs. This would minimize local rate variations and would be the most fair to states that happen, for whatever reason, to have a high proportion of revenues in the interstate jurisdiction.

In conclusion, a universal service mechanism based solely upon interstate revenues may not be sufficient to make rates in rural, insular and high cost areas reasonably comparable to urban areas. A revenue mechanism based upon the combined revenues of interstate carriers is consistent with the Act and will avoid undesirable consequences such as bypass and the evasion of the surcharge. Finally, a system based upon combined revenues will be fairer for those states that, for whatever reason, happen to have a high proportion of interstate traffic. The Commission should finance universal service from surcharges on both the interstate and intrastate revenues of interstate carriers.

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[14] As noted above, under the Commerce Clause, states may impose taxes upon interstate communications. *Goldberg v. Sweet*, 109 S.Ct. 582 (1989).

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	CC Docket No. 96-45
Federal-State Joint Board on Universal Service	)	
	)	

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Commission Comments have been furnished to the parties on the attached service list this 9th day of April, 1997.

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